WONG SEE NYAM

v.

LEMO SDN. BHD.

HIGH COURT MALAYA, MUAR
TUAN RICHARD TALALLA J
[COMPANIES (WINDING-UP) NO. 28-14 OF 1989]
7 SEPTEMBER 1995

COMPANY LAW: *Petition to wind up respondent company - Section 218 Companies Act 1965 - Petitioner judgment creditor of respondent - Respondent placed under receivership by debenture holder - Whether receiver has locus standi to oppose petition - Whether Court should wind up respondent when all the unsecured creditors want it to be wound up - Whether respondent has satisfactorily shown that the injury which the winding up would inflict was out of all proportion to the benefit it would bestow on the unsecured creditors.*

The petitioner obtained judgment in the Sessions Court against the respondent company. The petitioner caused a winding up petition to be issued against the respondent after the respondent had failed to comply with a statutory demand issued pursuant to s. 218 of the Companies Act 1965 (the Act). The petition was supported by an unsecured creditor to whom the sum owed was a judgment debt of RM43,968. The respondent had been placed under receivership by the debenture holder and the receiver filed an affidavit opposing the petition.

The question that arose was whether the receiver had the *locus standi* to oppose the petition. The Court also considered the question of whether the respondent company should be wound up when all the unsecured creditors want it to be wound up.

Held:

[1] Following the case of *Tan Ah Teck (T/A Plumcon Plumbing & Construction Co.) v. Coffral (Malaysia) Sdn. Bhd.,* the receiver has no legal authority to apply to stay the petition, he being an agent of the persons who appointed him under the debenture, and not the agent of the respondent company. There is not a shred of evidence before the Court that the receiver is a competent person to oppose the petition. On this ground alone the receiver's application to oppose the winding up should be dismissed.

[2] *Prima facie* the petitioning creditor was entitled to an order of winding up of the respondent and the onus was on the receiver to satisfy the Court that the injury which winding up would bring to the debenture holder was out of all proportion to the benefit it would bestow on the petitioner. In the instant case, the petitioner by reference to s. 220(l) and s. 292(l)(a) of the Act would be entitled by way of priority, to reimbursement of the costs and all expenses of the winding up including the taxed costs, to all other unsecured debts and to seek the assistance of the Court in regard to the liquidator's conduct respecting the respondent. There was no injury to the debenture holder who stood protected of its rights as a secured creditor under s. 291(2) of the Act and in the circumstances the petitioner was entitled to an order to wind up the respondent company.

[3] The petitioner was entitled to costs against the respondent as prayed in the petition, such costs to be limited to the costs of the proceedings in the winding up as if unopposed. Bearing in mind that the directors of the respondent could not be located and that at all times instructions relating to these proceedings had been taken from the

receiver and not the directors, the costs of the petitioning creditor relative to that part and extent of the proceedings opposed by the receiver are to be taxed and paid by the receiver personally.

[Orders accordingly].

[Editorial Note: Upon taxation of costs, a sum of RM40,000 for getting up was granted to the petitioner].

Cases referred to:
Tan Ah Teck (T/A Plumcon Plumbing & Construction Co) v. Coffral (Malaysia) Sdn Bhd [1992] 1 MLJ 553 ***(foll)***
Newhart Development Ltd. v. Co-operative Commercial Bank Ltd. [1978] 2 All ER 896 ***(refd)***
Kim Wah Theater Sdn. Bhd. v. Fahlum Development Sdn. Bhd. [1990] 1 MSCLC 90 ***(dist)***
re Chapel House Collery Company [1883] 24 C.A. 259 ***(disst)***
Cetico Sdn. Bhd. v. The Tropical Veneer Co. Bhd. [1988] 2 MLJ 665 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 218, 220(1), 236(2)(c)(3), 291(2), 292(1)(a)

Other source referred to:
The Law of Company Liquidation, McPherson, 2nd Edn., (1980) p. 55

For the petitioner - Alex Chang Huey Wah; M/s. Ong Ban Chai & Co.
For the receiver - Izabella De Silva; M/s. Iza, Ng Yeoh & Kit
For the supporting creditor - Victor Issacs; M/s. Isaacs & Partners.
For the official receiver - Raja

JUDGMENT

Richard Talalla J:

This is a petition for the winding up of the respondent company (Lemo) under s. 218 of the Companies Act 1965 (the Act).

Lemo was incorporated on 22 September 1977 with an authorized capital of RM4,000,000 and paid up capital of RM1,613,945 at RM1.00 per share. On 19 August 1980 and on 16 December 1982, Lemo executed two debentures in favour of Bank Pertanian (the debenture holder) as security for a loan which as at the time of the hearing of this petition on 28 February 1993 stood at nearly RM13.5 million, a large component of which represented accrued interest, the original loans being for RM4.1 million and RM1.4 million respectively. On 21 October 1988 the debenture holder placed Lemo under receivership and appointed the receiver of Lemo.

On 18 June 1981 the petitioner obtained a judgment in the Muar Sessions Court against Lemo for a sum of approximately RM18,000. The judgment debt was not satisfied. On 13 September 1987 the petitioner caused a statutory demand, pursuant to s. 218 of the Act to be issued and served on Lemo. Still the debt was not paid. On 5 December 1989 the petitioner caused this petition to be filed. The petition was duly advertised and gazetted. An unsecured creditor, Associated Tractors Malaysia Sdn. Bhd. became the sole supporting creditor to the petition. The sum owed to the supporting creditor was a judgment debt of RM43,968. The receiver filed an affidavit opposing the petition.

There are 2 issues to be decided, the outcome of which will determine whether or not Lemo ought to be wound up. The first issue is whether the receiver has *locus standi* to oppose

the petition. In *Tan Ah Teck (T/A Plumcon Plumbing & Construction Co) v. Coffral (Malaysia) Sdn. Bhd.* [1992] 1 MLJ 553 the petitioner petitioned for the winding up of the respondent (Coffral) under s. 218 of the Act. At the time of presentation of the petition, Coffral was placed under receivership by its debenture holder. The receiver and manager of Coffral appointed by the debenture holder applied to stay or dismiss the petition. It was contended that the receiver was not competent to make the application apposing the winding up petition or to rebut the presumption under s. 218 of the Act.

Wan Yahya J (as he then was) after reviewing the authorities on this subject held as follows at p. 558:

> On the foregoing authorities I am prepared to hold that a debenture holder receiver is only empowered to act and do all those things which he is so authorised according to the debenture and the covering trust deed which provide for his appointment. In the absence of any express or implied terms to the contrary in the debenture and trust deeds, receivers appointed out of Court are not agents of the company. A debenture holder receiver's primary duty is to realise the company's assets, to distribute the proceeds to the debenture holders in satisfaction of their claims and to return any surplus assets to the company.
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> In the hearing before this Court, Counsel for the receiver neither canvassed nor produced any document to support any contention that they were acting as agents on behalf of Coffral and I have no hesitation in holding that they were not. If they were not agents of the company, can they appear as one of them did to object to the winding up application by Plumcon (the petitioner)? In my opinion they were not competent to do so. If the receivers were not a competent party, the next question that may arise is who should have been the proper party to make such an application. I am inclined to think that the directors could have done so. The mere appointment of receivers does not necessarily bring about the termination of a company's activities or its liquidation. If the receivers are able to realise sufficient assets to satisfy the debenture holder's claim, the company may yet continue to function as a going concern.

His Lordship went on to consider at p. 559 the case of *Newhart Development Ltd. v. Co-operative Commercial Bank Ltd.* [1978] 2 All ER 896 where it was held that a provision in a debenture empowering the receiver to bring an action in the name of the company whose assets were charged was merely an enabling provision, investing the receiver with the capacity to bring such an action, and did not divest the company's directors of their power to institute proceedings on behalf of the company, provided that the proceeding did not interfere with the receiver's function of getting in the company's assets or prejudicially affect the debenture holder by imperilling the assets.

I agree and adopt the above views and hold the receiver has no legal authority to apply to stay the petition being the agent of the persons who appointed him, not the agent of Lemo. There is not a shred of evidence before this Court that he is a competent person to oppose the petition. Hence, based on this point alone, I should dismiss the receiver's application to oppose the winding up. However, I find it neat that I should also consider the second issue.

The second issue before me is whether the Court should wind up the company when all the unsecured creditors want it to be wound up. Lemo has to satisfy me that the injury which the winding up would inflict upon it was all out of proportion to the benefit it would bestow on the unsecured creditors.

In *Kim Wah Theatre Sdn. Bhd. v. Fahlum Development Sdn. Bhd.* [1990] 1 MSCLC 90, 485, the number of creditors opposing the winding up petition outnumbered those who favoured a winding up order. The opposing creditors sought a stay of the petition for a certain period

so as to enable the respondent to complete constructing certain flats so that they could fulfill their obligation to the purchasers of the uncompleted flats. Siti Norma Yaacob J. (As she then was) held thus at p. 90, 486:

> The law on the functions of the Court when dealing with a petition for the compulsory winding up a company is that once the debt has been proved to be upheld and that the company is insolvent, the petitioner is entitled to a winding up order *ex debito justitiae*. However whilst continuing to recognise the creditors' *prima facie* right to a winding up order, there are instance swhere such right is subject to the discretion provided by the language of s. 221(1) of the Companies Act 1965, in that the Court may decide not to do so. One of such instances is where the petition is opposed by a majority of the creditors. In *Re A. B.C. Coupler & Engineering Co. Ltd* [1961] 1 All ER 354, it was held that in deciding whether to make a compulsory winding up order, the Court should have regard to the wishes of the majority of the creditors, because these wishes, although not conclusive, possess great weight and if they are reasonable, the Court should follow them in the absence of special circumstances. See also the case of *Re P. & J. Macrae Ltd.* [1961] 1 All ER. 302.

In *re Chapel House Colliery Company* [1883] 24 C.A. 259, a debenture holder to a small amount presented a petition to wind up the company, the debt on the footing of which he petitioned being the arrears of interest on his debentures. A vast majority of the other debenture holders opposed the petition, and none of them supported it. The trial Judge stayed the petition for six months and on appeal the Court of Appeal dismissed the petition unanimously. At p. 269, Bowen L.J. held thus:

> The case may be decided on the simple principle that no one can be entitled to ask for a winding up order when it is impossible that he should obtain anything by it. Here, if a winding up order were made, there are no assets on which it would take effect. In all the cases in which the expression has been used that a creditor is entitled *ex debito justitate* to a winding up order, I think it is used in a special sense. I do not think it was ever meant to lay down that the object of the Act was to give a creditor a right to a winding up order when it was plain that he could derive no benefit from it. .. It is an abuse of the procedure to set it in motion when it is shown that it cannot in any degree accomplish the purpose for which it was establishes by the Legislature.

The facts in the aforementioned cases are the converse of those in the case before me. Associated Tractors is in favour of the winding up and furthermore Lemo's sole asset is now being managed by the receiver. Accordingly, I do not accept the submission of Counsel for the receiver based on the aforementioned cases. Counsel for the receiver submitted that the receiver had at all times been desirous of selling the Lemo's sole asset which is 2,000 acres of oil palm in Kemaman, Terengganu but had been prevented from doing so by certain shareholders who had on 20 August 1986 obtained in appellate proceedings before the Supreme Court by consent an interim order which required any agent of Lemo to obtain the leave of Court before dealing with the land in question, there being 2 lots of land, one of which had been injunctioned. They are contiguous lots comprising one estate. Counsel for the receiver submitted that although technically the uninjuncted lot can be sold unhindered by the Court order such a course was undesirable as that lot would have fetched much less than if the estate were sold as a whole.

In the Supreme Court the appellants were the shareholders and the respondents 2 of the previous shareholders, it being claimed that the previous shareholders had not been paid the price of their shares under a sale and purchase agreement dated 8 April 1981 while the new shareholders who had purchased those shares had gone into possession of the estate.

It was against this background that the Court by consent ordered a stay of all dealings without leave.

On 11 May 1989 the receiver applied to the High Court for such leave and on 9 September 1991 leave was granted by that Court. On 30 September 1991 the old shareholders appealed to the Supreme Court against the decision of the High Court by which such leave was granted and it was in this appeal that the interim consent order abovestated was made. 15 March 1993 was the date fixed by the Supreme Court for hearing of the appeal but the Supreme Court vacated that date.

Such being the circumstances, it was argued on behalf of the receiver that if a winding up order were to be made, immediately the price of the estate on the open market would fall as the sale would become known as a forced sale and also that there would be prejudice to the guarantor of the loan whose liability was for the full amount of the debt and the short fall which would be greater upon realisation in a forced sale.

Counsel for the receiver submitted that what was being sought was not the dismissal of the petition but an adjournment of it so as to enable the receiver to await disposal of the said appeal and if the appeal was dismissed, time, say 4 to 6 months, to effect a sale in the open market. In this regard, it was pointed out that the petitioner was himself guilty of delay, having taken more than two years from the time he obtained judgment against Lemo to commence this petition and had been responsible for a number of adjournments of this petition.

On behalf of the petitioner it was argued that demand for payment had been made before commencement of the action and after judgment was obtained but the demand was not met. Time was given to the receiver to pay but he did not effect payment. The receiver had an interest common with the petitioner to sell. However the receiver was hampered by the interim Court Order made in the pending appeal to the Supreme Court whereas if a winding up order were to be made the common interest of all parties to these proceedings would be achieved. Pursuant to s. 236(2) of the Act, the estate could be sold *inter alia* by private contract and who better to do it than the liquidator who has no interest at all, no interest to discriminate between secured and unsecured creditors, compared to the receiver who is exclusively concerned with the interest of the debenture holder. Furthermore, Counsel for the petitioner submitted, the actions of the liquidator were supervisable by the Court but not so that of the receiver, that under the management of the receiver the assets of Lemo shrank in value and the debt went up from just over RM1 million to RM9 million in about 28 months, that there was nothing before the Court about the management of Lemo in the hands of the receiver since he assumed that role, that there was no word about the profits from sales of oil palm fruits in that time.

In deciding this matter I followed the decision of Shankar J (as he then was) in *Cetico Sdn. Bhd. v. The Tropical Veneer Co. Bhd.* [1988] 2 MLJ 665, where the unsecured creditors presented a petition to the Court to wind up the company. UMBC is the secured creditor who is opposing the winding up and had applied to dismiss or stay the petition. It was held by Shankar J in dismissing the bank's application that the unanimous wish of the unsecured creditors must prevail over that of the applicant bank.

In *Cetico's* case at page 668 Shankar J referred to texts from *The Law of Company Liquidation* by McPherson (2nd Ed.) (1980) at page 55 which is stated as follows:

There are in fact, certainly no more than five, and probably only four, reasons which will justify the Court in refusing to make an order on the petition of an unpaid creditor. These are that (1) the petitioner's debt amounts to less than £100; (2) the debt is *bona fide* disputed by the company; (3) the company has paid or tendered payment of petitioner's debt; (4) winding up is opposed by other creditors; and (5) the company is in the process of being wound up voluntarily.

At pages 61 and 62 it is stated:

Opposition to winding up may proceed from the petitioner's fellow creditors, who may be secured or unsecured, or from the company or (what is virtually the same thing) from the shareholders. The significance of opposition to winding up varies in direct proportion to the relative importance of the opposing interests involved. Where the company is insolvent, the foremost consideration naturally is in the interest's of the creditors; and these prevail over the interest of other persons likely to be affected by the winding up, such as the company and shareholders. **As regards creditors, more importance attaches to the views of the unsecured creditors for the obvious reason that, unlike the secured creditors they have no means other than winding up by which they can obtain payment of their debts.** (emphasis mine)

And at page 64 it is stated:

Obviously the general or unsecured creditors are the ones most likely to be affected by the refusal to make an order, for it will deprive them of what is virtually their only remedy against the company. It follows that their wishes in the matter are, as against those of other creditors, entitled to primary consideration (*Re Airfast Services Pty. Ltd.* [1976] 2 ACLR)

At p. 335, the author continues:

For practical purposes the debenture holders in this case were virtually in the same position as shareholders since they had an obvious interest in ensuring that the company and its business were continued so that the profits earned could be used to discharge the company's liabilities for principal and interest on the debentures. In circumstances such as these it would be most unjust to refuse the order since a secured creditor, when he makes his loan, bargains to receive security as his protection against loss in the event of winding up and **it would not be right to give him the power to impair the remedy which is mainly for the benefit of unsecured creditors.** However, the decision probably does not go so far as to establish that the wishes of unsecured creditors in the matter of winding up will invariably be preferred to those of creditors who are secured, **although this is likely to be so in all cases except those where injury winding up will inflict upon the latter is out of all proportion to the benefit it will bestow on the former.**

After citing the above passages, Shankar J at p. 667, stated thus:

The other problem here is that, if the winding up order is not made, the unsecured creditors will have no control over the manner in which the company is run and they will have no right of access to any information as to how the company is disposing of its assets. ... (the) affidavit was not accompanied by an up-to-date auditor's report by way of a balance sheet and profit and loss account so as to present a true and fair view of the present financial situation of the company.

Further at p. 668 His Lordship continued:

... Had the bank and the receivers and managers acted in good time so as to put the unsecured creditors in a position in which they could have made an informal appraisal of their chances of recovery of some portion of their losses, and if some acceptable profit sharing arrangement had been broached so that the unsecured creditors were not made to feel that they were being

pressured into sacrificing their only remedy in exchange for the eligibility of standing in the queue four years from now, this Court may have been disposed to look at the matter differently.

I accepted the proposition that *prima facie* the petitioning creditor was entitled to an order of winding up of the respondent and that the onus was on the receiver to satisfy the Court that the injury which winding up would bring to the debenture holder was out of all proportion to the benefit it would bestow on the owner by reference to ss. 220(1) and 292(1)(a) of the Act would be entitled by way of priority, to reimbursement of the costs and all expenses of the winding up including the taxed costs, to all other unsecured debts and by reference to s. 236(3) of the Act to seek the assistance of the Court in regard to the liquidator's conduct respecting the respondent as adverted to in *Cetico's* case. There was no injury to the debenture holder who stood protected of its rights as a secured creditor. See s. 291(2) of the Act. I did not accept as probable a smaller sum being realised upon sale of the estate simply because of the naming of a winding up order. The rights of the receiver under the terms of the debenture to sell the estate by private contract remained intact and even as a final measure of protection in this regard they could also sell the estate by private contract. See s. 236(2)(c).

Admittedly there was delay but that delay occurred not only in these proceedings but also in related proceedings and if there was delay on the part of the petitioner in bringing this petition or having it adjourned on a number of occasions his delay is outweighed by that brought about by the receiver. To my mind, the time was ripe to bring the litigation before me to a just end.

As to the liability of the guarantor, I did not see that liability as being enhanced in the event of a winding up order being made.

Accordingly I made an order for winding up Lemo.

As to costs which are always discretionary, I made an order for costs as prayed in the petition, such costs be limited to the costs of the proceedings in the winding up as if unopposed and by reference to s. 220(l) of the Act. As to costs of the petitioning creditor relative to that part and extent of the proceedings opposed by the receiver, those costs were ordered to be taxed and paid by the receiver personally, and in this regard I had in mind that Counsel for the respondent had informed me that the directors of the respondent Lemo could not be found and that at all times instructions relating to these proceedings had been taken from the receiver and not the directors.

It is vital that the Court be informed of the activities of the receiver who had been managing Lemo and the estate approximately two years from the date of opposition but such report was not forthcoming. There was no explanation given to the Court to say why the value of Lemo had greatly depreciated and Lemo's debt to the bank had risen to RM13,422,398.97. Clearly, due to the delay and lack of explanation by the receiver, there is no longer a chance for revival and it would be futile to explore any possibilities of a revival, though at the beginning, in the receiver's affidavit affirmed on 21 October 1990, the receiver did depose to the fact that there is a chance for the revival of the company given time.

It did occur to me subsequently that the winding up order would have the effect of undermining the consent order made by the Supreme Court. That consequence had not been put to me before the winding up order was made. It was incumbent on the receiver so to do. Now it is *fait accompli*. In any event apart from the right of the respondent to appeal against

the making of the winding up order, I take the view that it was duty of the receiver to bring the winding up order to the notice of the parties to the consent order and thereafter leave them to take such steps, if any, as all or any of them thought fit.